# UNITED NATIONS APPEALS TRIBUNAL
# TRIBUNAL D'APPEL DES NATIONS UNIES

Judgment No. 2022-UNAT-1194

**Jafar Hilmi Wakid**

**(Appellant)**

**v.**

**Commissioner-General**
**of the United Nations Relief and Works Agency**
**for Palestine Refugees in the Near East**

**(Respondent)**

## JUDGMENT

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| Before: | Judge Kanwaldeep Sandhu, Presiding<br>Judge Graeme Colgan<br>Judge Dimitrios Raikos |
| Case No.: | 2021-1534 |
| Date: | 18 March 2022 |
| Registrar: | Weicheng Lin |

Counsel for Appellant: Mohammad Mustaf Abdullah

Counsel for Respondent: Hannah Tonkin

**JUDGE KANWALDEEP SANDHU, PRESIDING.**

1. The Appellant, a former teacher and school Principal with the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA or the Agency), disputes the Agency's decision to impose the disciplinary measure of separation from service without termination indemnity due to serious misconduct in the form of sexual exploitation and abuse (the contested decision). The Appellant applied to the UNRWA Dispute Tribunal (UNRWA DT) challenging the contested decision. In Judgment No. UNRWA/DT/2020/064 (the Impugned Judgment), the UNRWA DT dismissed his application. The Appellant appeals the Impugned Judgment.

2. For the reasons below, we remand the matter back to the UNRWA DT for rehearing.

## Facts and Procedure

3. Effective 26 December 1990, the Appellant was employed by the Agency as a Teacher at Baqoura School, Grade 6, Step 1, Jordan Field Office (JFO). At the time of the material events, he was employed by the Agency as School Principal, Grade 15, Step 8, at Awajan Boys' Preparatory School, JFO (Awajan School).

4. On 15 August 2016, a mother of a student (Complainant) submitted a complaint alleging sexual exploitation and abuse by the Appellant.

5. On 23 August 2016, the Director of UNRWA Operations, Jordan (DUO/J) referred the Complainant's allegations to the Department of Internal Oversight Services (DIOS). On the same date, the DIOS Intake Committee determined that a preliminary assessment should be conducted into these allegations of misconduct.

6. The Preliminary Assessment Report (PAR) dated 12 December 2016 recommended that the case be investigated. By letter dated 22 January 2017, the Appellant was formally notified of the investigation. He was interviewed on 29 January 2017.

*The Misconduct Allegation and Investigation:*

7. The Complainant alleged that on 15 August 2016, she visited the Appellant's office to request a transfer of her younger son from a private school to Awajan School where her older son had already been enrolled for the last few years.[1]

8. The Complainant's visit to the Appellant's office was on a Monday morning during the summer break. The Appellant, as school principal, together with some teachers, worked on Mondays from 9:00 a.m. to 12:00 p.m. during the summer break. When the Complainant arrived at the Appellant's office, several other teachers were present in his office. In the presence of the other teachers, the Appellant refused the Complainant's request to have her younger son enrolled. In her interview during the investigation, the Complainant indicated that the Appellant touched her inappropriately outside his office, in the corridor, as she was leaving the school building and after handing her the approved transfer form. In addition, he "addressed her with sexual connotations".

9. After the alleged incident, the Complainant went directly to the Agency's Zarqa Area Office to submit her complaint along with the approved transfer form.[2]

10. In the 11 April 2017 investigation report (the Investigation Report), the investigators interviewed teaching staff including Mr. AZ who was present when the Complainant spoke to the Appellant on 15 August 2016. He remembered the Appellant refusing to enroll the Complainant's son. after which the Complainant threatened "she would complain". He did not know how the son became enrolled but stated that the Appellant remained in his office and did not follow the Complainant into the corridor. In addition, Mr. IM and Mr. KAK were interviewed as they were also present at the meeting. They also indicated that the Complainant demanded enrollment otherwise she would "complain". They stated that they remained with the Appellant after the Complainant left the office. They did not know why the Appellant subsequently admitted the Complainant's son.

11. In the Appellant's interview, he denied the allegations. The investigators did not find his version of events to be credible because none of the witnesses recalled how the Complainant's son came to be enrolled. In addition, the Appellant stated that, on the day in

[1] Impugned Judgment, para. 64.
[2] *Ibid*., para. 66.

question, he did not follow the Complainant into the corridor to hand her the signed transfer form but sent a student. However, the witnesses did not mention the student and the Appellant could not recall the name of that student. In explaining why he changed his mind regarding the enrollment, the Appellant stated he did so after one of the teachers stated it was a "humanitarian" issue as the Complainant's son had thalassemia which accounted for his previous troublesome conduct. However, the investigators noted the Appellant could not fully explain the condition or why it prevented him from dismissing the son previously.

12. In weighing the testimonies, the investigators reasoned that the Complainant was "adamant enough" to complain despite receiving the enrollment of her son and volunteering teachers as witnesses. The investigators could not ignore why the Complainant would make false accusations and risk her standing in the community and did not agree with the Appellant that the complaint was "revenge" for prior incidents or because the teachers berated her son. The investigators concluded that the Appellant's account of the circumstances was "unlikely and not supported by additional evidence or witness testimony", and that there was sufficient evidence to show that the Appellant sexually touched the Complainant, taking advantage of his position as Principal.

13. On 25 September 2017, the Head, Field Legal Office, Jordan (H/FLO/J) issued the Appellant a due process letter, informing him of the findings of the investigation and inviting him to respond to the allegations. On 6 October 2017, the Applicant responded to the due process letter and denied the allegations.

14. On 12 June 2018, the DUO/J imposed on the Appellant the disciplinary measure of separation from service without termination indemnity.

15. Subsequently (date unknown), the Complainant provided a written retraction of the complaint. This was provided to the UNRWA DT. In the translated, undated retraction, the Complainant states that the complaint she filed on 15 August 2016 against the Appellant was false. She states that the Appellant did not follow her into the corridor, remained in his office, and sent approval of her son's transfer to her by way of another student. She says she filed the complaint after he initially rejected her son as a "troublemaker and underachieving" in front of others which was "embarrassing" for her.

*The UNRWA DT Procedures and Judgment*

16. For purposes of determination of issues raised by the Appellant, it is relevant to set out the procedural history of the matter before the UNRWA DT.

17. On 13 November 2018, the application was filed with the UNRWA DT. By Order No. 009 (UNRWA/DT/2019) dated 7 January 2019, the UNRWA DT granted the Respondent's motion for an extension of time to file his reply.

18. On 6 February 2019, the Agency submitted its reply. The reply was transmitted to the Appellant on the same day along with the unredacted versions of the PAR and the 11 April 2017 Investigation Report.[3]

19. By Order No. 143 (UNRWA/DT/2020) dated 25 August 2020, the UNRWA DT informed the parties about the witnesses who would testify at the oral hearing.

20. On 31 August 2020, the scheduled oral hearing took place. The UNRWA DT heard from the parties and three witnesses who were teachers. The Complainant did not attend despite attempts to secure her attendance.[4] The UNRWA DT did not swear the Appellant in as a witness "per its consistent practice"[5].

21. After the oral hearing, by Order No. 156 (UNRWA/DT/2020) dated 31 August 2020, the UNRWA DT ordered the Agency to provide a copy of the Complainant's hand-written complaint. The Agency did not submit its response to Order No. 156 in due time and failed to produce the requested documents.

22. By Order No. 173 (UNRWA/DT/2020) dated 17 September 2020, the UNRWA DT accepted into the case record the Agency's belated response to Order No. 156. In addition, the UNRWA DT ordered the Agency to produce all the exhibits referenced in the 11 April 2017 Investigation Report and ordered the Appellant to submit his new evidence referred to during the hearing. The UNRWA DT further ordered the parties to submit their closing arguments on or before 2 October 2020.

[3] *Ibid.*, para. 58.
[4] *Ibid.*, para. 59.
[5] *Ibid.*, para. 60.

23. On 20 September 2020, the Agency filed his response to Order No. 173 and produced all the exhibits referenced in the 11 April 2017 Investigation Report. The Agency's submission was transmitted to the Appellant on the same day.

24. On 21 September 2020, the Appellant filed his new evidence referred to during the hearing. The parties then submitted their closing arguments.

25. In the Impugned Judgment, the UNRWA DT dismissed the Appellant's application. The UNRWA DT determined that (1) the facts on which the disciplinary measure was based had been established by clear and convincing evidence, (2) the facts legally supported the conclusion of serious misconduct, (3) the disciplinary measure was proportionate to the offence, and (4) the Agency's discretionary authority was not tainted by evidence of procedural irregularity, prejudice or other extraneous facts, or error of law.[6]

26. On the facts upon which the disciplinary measure was based, the UNRWA DT held found the Complainant's testimony and description of the sequence of events to be credible[7] and dismissed her written retraction because, having obtained approval from the Appellant's transfer, the Complainant would have had no motive to submit a fabricated complaint against the Appellant. The UNRWA DT held that her retraction was not credible, noting that women were in the category of people who have a most vulnerable status (GSC No. 07/2010) and that there was potential for retaliation or pressure against the Complainant.[8] Conversely, the UNRWA DT found the Appellant's statements and his description of the sequence of the events to be not credible.[9] It found the testimonies of three teachers to be inherently contradictory and not credible.[10] For example, the UNRWA DT noted that Mr. KA, one of the three teacher witnesses, omitted mentioning a critical aspect of the events, namely that he allegedly saw the Appellant hand the transfer form to a student in order for that student to transmit it to the Complainant.[11] The UNRWA DT held that, viewed cumulatively, there was a clear and convincing concatenation of evidence establishing, with a high degree of probability, that the alleged misconduct had, in fact, occurred.[12]

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[6] *Ibid.*, para. 100.
[7] *Ibid.*, para. 73.
[8] *Ibid.*, para. 67.
[9] *Ibid.*, para. 81.
[10] *Ibid.*, para. 83.
[11] *Ibid.*, para. 86.
[12] *Ibid.*, para. 86.

27. As to whether the facts legally supported the conclusion of serious misconduct, the UNRWA DT held that, under the provisions of the applicable regulatory framework, the Appellant's actions were in clear violation of Area Staff Regulations 1.1, 1.4 and 10.2; Area Staff Rule 110.1; PD A/10 at para. 10; and GSC No. 07/2010 at paras. 3 and 4, which relate to serious misconduct and sexual exploitation and abuse.

28. On the issue of whether the disciplinary measure imposed on him was proportionate, the UNRWA DT recalled PD A/60 and Area Staff Rule 110.1, and held that it was proportionate to the nature and gravity of the Applicant's serious misconduct.[13]

## Submissions

### The Appellant's Appeal

29. The Appellant submits that the UNRWA DT erred in procedure and jurisdiction when it failed to provide the parties with an audio recording of the hearing, a hearing transcript, and copies of the investigation reports and its exhibits within an adequate and reasonable amount of time. He also notes that he was not provided with those documents by the UNRWA DT until after the hearing (on 20 September 2020).

30. In addition, the Appellant says that the UNRWA DT also erred by failing to exercise its jurisdiction and substantive authority to impose costs on any party that has manifestly abused the proceedings, despite the fact that, in paragraph 46 of the Impugned Judgment, it found that the Agency had manifestly abused the proceedings by failing to comply with its Order No. 156 (UNRWA/DT/2020) and Order No. 163 (UNRWA/DT/2020) but imposed no costs against it.

31. In terms of due process rights, the Appellant submits that the UNRWA DT erred in fact and law when it concluded that the Appellant's due process rights had been respected during the investigative process.

32. Further, he contends the UNRWA DT erred in its assessment of the Complainant's testimony and credibility when it found that her testimony and description of the sequence of events was entirely credible. The Appellant points out discrepancies in the Complainant's story including why she attended the office and how she obtained the student transfer certificate. He

[13] *Ibid.*, para. 99.

argues that the Complainant was "angry and emotional" during her meeting with the Acting Director of Education because the Appellant had refused to admit her son immediately. The Complainant then fabricated the complaint about him.

33. As for the Complainant's retraction, he contends the UNRWA DT erred when it held that the Complainant's retraction was not credible on the basis that it was provided as a result of pressure from her community and when it stated that it was most probable that the Complainant did not attend the hearing because of such pressure. The Appellant requests the Appeals Tribunal to find these conclusions are "speculations, predictions and wild assumptions that have been exaggerated and overblown". Further, the Appellant submits that Agency's submission that the complainant may have been illiterate was baseless, false and misleading.

34. The Appellant submits that the UNRWA DT erred in assessing his credibility, particularly when it failed to distinguish between the student admission form and the student transfer certificate. The Appellant submits that the student admission form, which was his responsibility, could not have been filled in, signed and stamped in a corridor, contrary to the suggestion of the UNRWA DT in paragraph 79 of the Impugned Judgment.

35. Finally, the Appellant submits that the UNRWA DT erred when it found that the testimony of the three teachers lacked credibility. The Appellant submits that the witnesses' credibility could not be challenged because they were "busy with visitors and students". He questions why they would bear false witness given their long service records "marked by honour and loyalty to their organization", noting that they had no self-interest.

36. The Appellant requests the following : (a) if the Appeals Tribunal rescinds the decision, to specify what is to happen to salary, allowances and entitlements, and pension contributions; (b) if the Appeals Tribunal rescinds the decision, to specify what should happen to end of service indemnity; (c) for the Appeals Tribunal to take the opportunity to establish firm jurisprudence in relation to the due process rights that the Agency must grant to staff members under investigation for misconduct during the investigative and disciplinary processes;(d) for the Appeals Tribunal to award costs against the Agency for abuse of process; and, (e) alternatively, that the Appeals Tribunal remand the case to the UNRWA DT for trial under a new judge.

**The Commissioner-General's Answer**

37. The Commissioner-General or the Agency submits that the UNRWA DT did not err as a matter of fact, law or procedure when it dismissed the Appellant's application on the merits. Further, he contends that the UNRWA DT did not err in its assessment of the evidence.

38. On the issue of the Complainant's retraction, the Agency submits that the UNRWA DT drew from previous similar cases and concluded having regard to the cultural context that the retraction was not credible.

39. Regarding the alleged inconsistencies between the first and second statements of the Complainant, the Agency submits that this was addressed at paragraphs 71-72 of the Impugned Judgment. Further, the Agency submits that, on the contrary, the UNRWA DT concluded that the Appellant's statements and description of the sequence of events were not credible. The Agency submits that, on the issue of the transfer form, the UNRWA DT's consideration and reasoning "remains unchallenged", and the UNRWA DT's assessment and conclusions "remain unassailed".

40. The Agency submits that the UNRWA DT did not err in law, fact or procedure in dismissing the Appellant's application. Accordingly, the Agency contends that the remedies sought by the Appellant have no legal basis.

41. The Agency requests the Appeals Tribunal to reject all the Appellant's pleas, to deny all relief sought and to dismiss the appeal.

## Considerations

*Request for Oral Hearing*

42. We deny the Appellant's request for an oral hearing before the Appeals Tribunal.

43. Under Article 8(3) of the UNAT Statute and Article 18(1) of the UNAT Rules of Procedure (Rules), the Appeals Tribunal may grant an oral hearing if it would assist in the expeditious and fair disposal of the case.

44. The Appellant makes the request for an oral hearing if the Appeals Tribunal "should decide to rule in the matter itself". However, an appeal before the Appeals Tribunal is not a rehearing of the matter but the ability of parties to appeal on narrow bases, such as errors of law, fact and jurisdiction of the UNRWA DT, not to decide the matter itself. We find that an oral hearing would not assist in expeditiously and fairly resolving the issues on appeal.

*Receivability*

45. As a preliminary matter, the Appellant raises the issue of the receivability of the present appeal and the delay the Appellant experienced in obtaining an Arabic translation of the Impugned Judgment.

46. He requests the Appeals Tribunal to note, by examining the record, that he filed his brief in Arabic. While the Impugned Judgment was handed down on 10 November 2020, the Appellant, despite reminders, did not receive the Arabic translation until 7 January 2021. He submits that UNRWA area staff applicants face considerable delays in receiving such translations. While the Respondent understands the Impugned Judgment in English, the Appellant is at a "frustrating standstill", unable to understand the details of the judgment and is denied access to the forthcoming session of the Appeals Tribunal. The Appellant requests the Appeals Tribunal to address that issue and to find that the present case was filed within 60 calendar days of the date on which the Appellant received the Arabic translation of the Impugned Judgment and is therefore receivable.

47. The Agency acknowledges that the appeal is receivable as the time limit for filing the appeal begins to run from the time the translation is received.

48. The appeal is, therefore, receivable.

49. There is a request from the Appellant for the Appeals Tribunals to address the issue of delays in receiving translations in general, which denies appellants who file their applications in Arabic access to the forthcoming session of the Appeals Tribunal. The Agency submits that there was no inordinate delay, and no prejudice was occasioned in the delay in transmitting the translation of the Impugned Judgment to the Appellant.

50. As the appeal is receivable and the Appeals Tribunal will review the merits of the appeal, the question of timely translation of judgments is not a matter for the Appeals Tribunal to further address but is better addressed to the UNRWA DT.

*Merits of the Appeal*

*The UNRWA DT's procedure*

51. We find that the UNRWA DT did not commit an error in procedure, such as to affect the decision of the case pursuant to Article 2(1) of the UNAT Statute. It is not sufficient for there to be an error of procedure, but it must be one that is such as to "affect the decision of the case".

52. The Appellant submits that the UNRWA DT erred procedurally when it failed to provide the parties with (1) an audio recording of the hearing and (2) a transcript of what transpired during the hearing, noting *Stoykov*[14] at paras. 20-21. Because his credibility and that of the three witnesses was decisive for the preparation of the defence, he requests the Appeals Tribunal to find that this error was a grave and fundamental flaw that requires the case to be stayed and remanded to a different judge for trial.

53. The Appeals Tribunal's judgment in *Stoykov* does not assist the Appellant. In *Stoykov*, the Appeals Tribunal "held that while the representatives of the parties were present at the oral proceedings, they are entitled to the record of the testimonies made at those proceedings from the relevant UNDT Registry" and that"[t]his record is critical to the preparation of the appeal case."[15]

54. In the present case, the UNRWA DT has available audio recordings of the hearings before it that constitute a record of the testimonies made at the proceedings. There is no requirement that the UNRWA DT provide to a party a copy of the recordings or their transcript without a specific request. Parties are entitled to request and receive the audio recordings of the hearing, but the Appellant does not claim that he requested either a copy of the audio recording or a written transcript as part of his preparation for the appeal.

[14] *Stoykov v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-440.
[15] *Ibid.*, para. 22.

55. We reject the Appellant's claim that the UNRWA DT committed an error in procedure, and we reject that the Appellant not receiving the recordings and hearing transcript affected the decision of the case. Further, the Appellant does not claim that he could not properly prepare his appeal without the audio recording or a transcript, but instead agrees in his submissions that the evidence in the record provides an adequate basis for the Appeals Tribunal to rescind the contested decision and overturn the Impugned Judgment. Therefore, this claim is without merit.

56. We agree with the Agency that the Appellant merely repeats arguments raised before the UNRWA DT and the appeals procedure is not an opportunity for a party to reargue his or her case.[16]

57. The UNRWA DT held that the Appellant was given the 11 April 2017 Investigation Report as early as 6 February 2019 and the exhibits referenced therein on 20 September 2020 (which was after the hearing), and he was given the opportunity to comment on the exhibits in his closing arguments.[17] The Appellant was provided with the Investigation Report and exhibits before the UNRWA DT issued its Judgment and was given an opportunity to review and respond to the content of these materials. The exhibits were provided by the Respondent as a response to Order No. 173 (UNRWA/DT/2020) and transmitted to the Appellant on the same day. Consequently, we find there has been no breach of procedural fairness during the UNRWA DT process in this regard. We accept the UNRWA DT's finding that the Appellant had ample opportunity to respond the allegations against him and comment on the Investigation Report and exhibits.

58. The main issue under consideration is whether the UNRWA DT erred on a question of law or of fact when it held that: (i) the facts in support of the allegations against the Appellant were established by clear and convincing evidence that he inappropriately touched and propositioned the Complainant on 15 August 2016 (ii) these facts amounted to misconduct; (iii) the sanction of dismissal was proportionate to the seriousness and gravity of the offense, and (iv) due process was respected in the course of the disciplinary proceedings.

*Clear and Convincing Evidence of Alleged Misconduct*

[16] *Crichlow v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-035.
[17] Impugned Judgment, para. 58.

59. In the Impugned Judgment, the UNRWA DT made factual findings to establish the events of 15 August 2016. These findings were primarily based on its assessment of the credibility of the Complainant, the Appellant, and three witnesses. We find the UNRWA DT erred in its assessment of credibility and consequently its findings of fact based on that assessment. The UNRWA DT found the Complainant's version of events credible even though she did not attend and testify at the hearing. The UNRWA DT's assessment of her credibility was determined on hearsay statements she provided to investigators in interview and as reported in the Investigation Report, and in any written material including her written retraction, and despite discrepancies in those statements. For example, in para 71 of the Impugned Judgment, the UNRWA DT states that "she had difficulty describing the events in a chronological and structured matter [and this] led to some confusion and contradictions in her statements" such as stating in the first interview that the teachers who had been in the room with her and the Appellant had left but in the second interview, she stated this was in relation to an earlier incident. It appears that, in assessing her credibility, both the investigators and the UNRWA DT placed significant weight on their view that the Complainant, having obtained the approval for her son's enrollment, had no motive to submit a fabricated complaint against the Appellant.

60. However, the UNRWA DT assessed the Complainant's evidence as credible despite having before it the Complainant's written retraction wherein she unequivocally revoked her allegations against the Appellant and provided a motive for her making the complaint, namely she was "embarrassed" that her son was a troublemaker.[18] In paragraph 67 of the Impugned Judgment, the UNRWA DT states that it is "not convinced" by the retraction because "[a]fter having examined several similar cases, it is the Tribunal's opinion that the Complainant's retraction must be result of pressure from her community to retract the complaint". But the UNRWA DT does not explain these "similar cases" or how they relate to the current situation. It also held it "most probable" that this was the reason the Complainant did not attend the hearing. These findings are made without evidence of this "pressure" on the Complainant. As a result, the UNRWA DT made findings without evidence and based on speculation. The Complainant did not attend the hearing and could not have provided these excuses for the written retraction. Therefore, the UNRWA DT erred on findings of fact that were central to its analysis of the Complainant's credibility and its Judgment. This error leads to no other conclusion other than it resulted in a manifestly unreasonable decision.

[18] Impugned Judgment, para. 66.

61. As a result, in reviewing the evidence and the findings of the UNRWA DT, including the unexplained retraction by the Complainant and her unexplained absence at the hearing, we find the UNRWA DT could not have found her version of events to the investigators be credible to the high evidentiary standard required. We do not discount the complaint or find that the Complainant may not have been a credible witness had she testified at the hearing and explained away her retraction. However, the UNRWA DT's assessment of the credibility of the Complainant is problematic.

62. The UNRWA DT finds that it is "convinced" that the Complainant could not have made a false complaint, despite the Complainant not attending to testify and to be questioned about the veracity of her retraction. Given she provided a written statement retracting her earlier evidence and story, it is logical that to infer that one of the two stories she gave (i.e. in the retraction or in the investigation/complaint) must be false. Therefore, we find it unclear as to how the UNRWA DT could be "convinced" of her credibility based on the evidence before it.

63. As for the Appellant's evidence, the UNRWA DT found his evidence not credible due to discrepancies his evidence and testimony. However, we note that the Appellant testified without having been sworn or providing a formal promise to tell the truth based on the UNRWA DT's "consistent practice".[19]

64. There is settled jurisprudence that some degree of deference must be given to the factual findings by the UNRWA DT as the court of first instance as it is in the best position to make findings of fact and assessing credibility of witnesses.[20] Also, "[t]he Appeals Tribunal 'must not interfere lightly in the exercise of the jurisdictional powers conferred on the tribunal of first instance to enable cases to be judged fairly and expeditiously and for dispensation of justice'."[21]

65. However, as stated in *Mbaigolmem*[22] "[t]he UNDT ordinarily should hear the evidence of the complainant and the other material witnesses, assess the credibility and reliability of the testimony under oath before it, determine the probable facts and then render a decision as to whether the onus to establish the misconduct by clear and convincing evidence has been

[19] Impugned Judgment, para. 60.
[20] *George M'mbetsa Nyawa v. Secretary-General of the United Nations*, Judgment No. 2020-UNAT-1024, para. 81.
[21] *Nadeau v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-733/Corr.1, para. 32.
[22] *Mbaigolmem v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-819, para. 29.

discharged on the evidence adduced." This did not occur here. The UNRWA DT did not hear the Complainant's testimony as she did not attend the hearing, dismissed her written retraction based on reasons not supported in evidence, and received Appellant's testimony without oath or affirmation.

66. As previously established by the Appeals Tribunal in *Molari*, when termination is a possible outcome, misconduct must be established by "clear and convincing evidence" which "means that the truth of the facts asserted is highly probable."[23] This imports two high evidential standards: "clear" evidence is that the evidence of misconduct must be unequivocal and manifest and "convincing" requires that this clear evidence must be persuasive to a high degree, appropriate to the gravity of the allegation against the staff member and in light of the severity of the consequence of its acceptance, as set out in *Negussie*[24].

67. But, in the present case, we find the UNRWA DT made fundamental errors of fact resulting in a manifestly unreasonable decision, namely in assessing the credibility of the Complainant's and Appellant's evidence and dismissing the Complainant's retraction without supporting evidence.

68. Therefore, we find that the high evidential standards required have not been met to support the finding that there is clear and convincing evidence that establishes to a high degree of probability that the alleged misconduct had occurred.

*Due Process in the Disciplinary and Investigative Process*

69. The Appellant says that the UNRWA DT erred in fact and law when it concluded that the Appellant's due process rights had been respected during the investigative process despite the Agency failing to provide him with the PAR and the 11 April 2017 Investigation Report and their exhibits.

70. The investigation process is set out in the DIOS Technical Instruction 02/2016 on UNRWA's Investigation Policy (the Policy). The Policy stipulates the role of the Intake Committee, the Preliminary Assessment, referral to DIOS and the need to conduct interviews with the subject "at which time the evidence collected, and in particular the inculpatory evidence, subject to para. 20 above, shall be presented to the subject for him/her to provide

[23] *Molari v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-164, para. 2.
[24] *Sisay Negussie v. Secretary-General of the United Nations*, Judgment No. 2020-UNAT-1033, para. 45.

his/her response" (paragraph 26). In addition, the Policy provides that "[p]rior to the interview, the investigator shall notify the subject of the allegations against him/her, generally describing the facts that are alleged to have occurred" (paragraph 27). There is no requirement that the subject of an investigation receive the PAR, the Investigation Report or their exhibits.

71. However, the Appeals Tribunal has previously held that due process rights of a staff member are complied with as long as s/he has a meaningful opportunity to mount a defence and to question the veracity of the statements against him.[25] "In disciplinary cases, only when the preliminary investigation stage is completed and a disciplinary process has begun, is the staff member entitled not only to receive written notification of the formal allegation, but also to be given the opportunity to assess the evidence produced against him or her."[26] The Appellant was given this opportunity. He was informed of the allegations against him and was afforded the reasonable opportunity to comment and make representations before action was taken against him.

72. We find no merit in the Appellant's argument that his due process rights were violated in this regard.

73. However, we find the UNRWA DT erred in law in its interpretation of paragraph 15 of the GSC No. 07/2010 which it found was only "recommendatory [in] nature"[27]. This provision provides that:

> The designated investigator shall prepare a report outlining the facts determined during the investigation and attaching relevant evidence. As early as possible, and in any case no later than three months from the submission of the formal complaint, the report **shall** be submitted to the Field Director or DHR, as applicable with a copy to DIOS. [emphasis added]

74. An ordinary and grammatical interpretation of this provision is that it is mandatory, not recommendatory, for the report to be submitted no later than three months from the submission of the formal complaint. In the present case, we note that the Investigation Report was submitted approximately seven months after receipt of the complaint. The UNRWA DT

[25] *Mohammed Yousef abd el-Qader Abu Osba v. Commissioner General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2020-UNAT-1061, para. 69.
[26] *Elobaid v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-822, para. 22.
[27] Impugned Judgment, para. 56.

should have considered this in determining whether the Appellant's due process rights were respected in the disciplinary process.

75. In conclusion, we remand the matter to the UNRWA DT for a rehearing of the matter and additional findings of fact pursuant to Articles 3 and 4(b) of the Appeals Tribunal Statute. Given the subjective assessment of the evidence in the Impugned Judgment, the rehearing should be before a different judge.

## Judgment

76. The Appellant's appeal is allowed and the Impugned Judgment is vacated. The matter is remanded to the UNRWA DT for a rehearing before a different judge.

Original and Authoritative Version: English

Dated this 18th day of March 2022.

| *(Signed)* | *(Signed)* | *(Signed)* |
|---|---|---|
| Judge Sandhu, Presiding<br>Vancouver, Canada | Judge Colgan<br>Auckland, New Zealand | Judge Raikos<br>Athens, Greece |

Entered in the Register on this 19th day of April 2022 in New York, United States.

*(Signed)*

Weicheng Lin, Registrar